81-1891

No. ——

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

MORRISON-KNUDSEN CONSTRUCTION COMPANY,

and

ARGONAUT INSURANCE COMPANY,
Petitioners,

v.

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR,

and

SONIA HILYER, WIDOW OF JAMES H. HILYER,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTIONS PRESENTED

1. Whether, despite the legislative history of the Longshoremen's and Harbor Workers' Compensation Act ("LHWCA") and fifty-four years of consistent administrative interpretation by the Department of Labor that has never been disturbed by Congress, the Court of Appeals was correct in including, for the first time by any federal court, employer payments into union trust funds as part of a deceased employee's "average weekly wage" under the Act.

2. Whether the decision of the Court of Appeals should be allowed to stand when it will result in new and endless litigation in the federal courts contesting which contingent interests should now be considered part of a deceased employee's "average weekly wage" under workers' compensation statutes, and how much each of these interests are worth under the particular facts of each case, despite this Court's ruling that one of Congress's principal legislative purposes was to ensure "prompt and certain recovery" for industrial injuries.

3. Whether the true purpose of calculating a worker's wage, at the time of death, for purposes of the LHWCA, is to determine what his or her surviving spouse has lost by reason of the death, rather than simply whether, as the Court of Appeals held, there is something of "value" that can be identified and thus included in the worker's wage, even though the surviving spouse will never qualify for the thing of value.

LIST OF PARTIES *

The parties in case No. 80-1388 before the Court of Appeals were Sonia Hilyer, the widow of James H. Hilyer, as petitioner, and Morrison-Knudsen Construction Company ("Morrison-Knudsen") and Argonaut Insurance Company ("Argonaut") as respondents. The parties in case No. 80-1440 were Morrison-Knudsen and Argonaut as petitioners and Mrs. Hilyer as the respondent. The parties in case No. 80-1504 were the Director of the Office of Workers' Compensation of the United States Department of Labor as the petitioner and Morrison-Knudsen and Argonaut as respondents.

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* Petitioner, Morrison-Knudsen Construction Company, reports, pursuant to Rule 28.1 of the Rules of this Court, that Morrison-Knudsen Company, Inc., is the parent company with subsidiary companies which are all wholly-owned. Affiliate companies not wholly-owned include: Accurate Manufacturing Company, Internacional de Engenharia S. A. (IESA), Moore Financial Group Inc., George E. Madding Company, Inc., and Westmoreland Resources, Inc.

Argonaut Insurance Company is a wholly-owned subsidiary of Teledyne Financial Corporation, which is a wholly-owned subsidiary of Teledyne, Inc. The following is a list of companies which are not wholly-owned subsidiaries of Teledyne, Inc., or its subsidiaries, but which may be deemed to be affiliates: Brockway Glass Company, Curtis-Wright Corporation, Litton Industries, Inc., Riechhold Chemical Company, Teledyne Canada Limited, and Unicoa Corporation.

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioners Morrison-Knudsen Construction Co. ("Morrison-Knudsen") and Argonaut Insurance Company ("Argonaut") pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit, which included employer payments into union trust funds as part of a deceased employee's compensation due under the Longshoremen's and Harbor Workmen's Compensation Act, 33 U.S.C. §§ 901 *et seq.*, as extended by the District of Columbia Workmen's Compensation Act, 36 D.C. Code §§ 501 *et seq.*

OPINIONS BELOW

The decision and order of the Administrative Law Judge (No. 76-DCWC-158) issued September 7, 1976, is not reported but appears as Appendix H (App. 36a) hereto. The order of the Benefits Review Board (Nos. 76-410, 410A) dated November 30, 1977, is reported at 6 B.R.B.S. 754 and appears as Appendix G (App. 28a) hereto. The per curiam order of the United States Court of Appeals for the District of Columbia Circuit (Nos. 77-2076, 78-1087) filed July 19, 1978, is not reported but appears as Appendix F (App. 27a) hereto. The decision and order on remand of the Administrative Law Judge (No. 76-DCWC-158) dated October 5, 1978, is not reported but appears as Appendix E (App. 23a) hereto. The order of the Benefits Review Board (No. 78-568) dated March 19, 1980, is reported at 12 B.R.B.S. 87 and appears as Appendix D (App. 17a) hereto. The opinion of the United States Court of Appeals for the District of Columbia Circuit (Nos. 80-1388, 80-1440, 80-1504), from which certiorari is sought, dated November 1, 1981, is reported 670 F.2d 208 and appears as Appendix C (App. 4a) hereto. The orders of the Court of Appeals denying a Petition for Rehearing and a Suggestion for Rehearing En Banc, dated January 14, 1982, are not reported but appear as Appendices A and B (App. 1a, 3a) hereto.

JURISDICTION

The Court of Appeals' decision in these cases was rendered on December 1, 1981 (App. 4a). A timely Petition for Rehearing and Suggestion for Rehearing En Banc was filed on December 15, 1981, and denied on January 14, 1982 (App. 1a, 3a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

RELEVANT STATUTES

The relevant statutory provisions are set forth as Appendix I (App. 50a) hereto.

STATEMENT OF THE CASE

These are three cases—all involving the same claimant and the same legal issues—which were consolidated on appeal in the United States Court of Appeals for the District of Columbia Circuit.

All three cases arose from the death of one James H. Hilyer during the course of his employment with petitioner Morrison-Knudsen Construction Company ("Morrison-Knudsen"). At the time of his death, Hilyer was covered by the District of Columbia Workmen's Compensation Act, 36 D.C. Code §§ 501, 502 (1973), which in turn incorporated the provisions of the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. §§ 901 *et seq.* (1976) ("LHWCA") (App. 50a).[1]

Under Section 9(e) of the LHWCA (see App. 52a), death benefits are computed by reference to the "average weekly wage" of the deceased employee on an annualized basis. However, since Hilyer had been working for Morrison-Knudsen for only five months prior to his death, the Administrative Law Judge, pursuant to Section 10 (b) and (d) of the Act (see App. 53a-54a), correctly determined Hilyer's average weekly wage by reference to the average *yearly* wages of a fellow employee whose compensation could most closely be compared to that of Hilyer.

At the time of his death, Hilyer had been a member of Local 456 of the Laborers' District Council of Washington, D.C., and Vicinity—an affiliate of the AFL-CIO. The collective bargaining agreement between that union and Hilyer's employer required, among other things, that the employer pay certain sums of money into three

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[1] Although a new District of Columbia statute will soon become law, it contains the same definition of wages interpreted by the court below. 36 D.C. Code § 301(19) (1981). Moreover, the definition espoused by the court was of the LHWCA, which of course has wider application than in the District.

union trust funds for each hour worked by each employee—namely, 28 cents into a health and welfare fund, 35 cents into a pension fund, and 5 cents into a training fund. Hilyer's widow, respondent Mrs. Hilyer, argued before the Administrative Law Judge that these payments to the union trust funds should be included in the determination of her husband's "average weekly wages" for the purpose of calculating the death benefits to be paid to her by Morrison-Knudsen. Following an unbroken tradition going back 49 years since the LHWCA had first been passed in 1927, the Administrative Law Judge rejected her contention (App. 36a), and the Benefits Review Board upheld his ruling (App. 28a).[2]

In so ruling, the Board noted previous Board authority to the effect that contributions by an employer to a health and welfare fund and a pension fund should not be included in the average weekly wage, and also found that this record did not reflect whether decedent's rights in the pension had even vested. The Board observed that "inclusion of the contributions to the pension fund reflects a belief that the employee would also continue to work for employer and build up his pension" (App. 32a), that the health and welfare fund was "contingent on an illness occurring" (*id.*), and that the actual value of the health and welfare program was "dependent on their [the family's] possible use of it" (App. 33a). The Board further noted that amounts contributed by the employer would "in all likelihood not buy decedent's family similar kinds of protection" (*id.*), and that the value of the training program was "highly speculative" (*id.*). The Board concluded:

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[2] The case was remanded for a reconsideration of attorneys' fees. A new opinion was rendered dealing with this issue (App. E), which was reviewed and modified by the Benefits Review Board (App. D). Although that issue was addressed by the Court of Appeals (App. 14a-16a), it is not before this Court for review.

> Therefore, it is clear that in this case that an employee's right to these funds and the actual value of them to the injured employee is highly speculative. [*Id.*]

Mrs. Hilyer appealed this ruling to the United States Court of Appeals for the District of Columbia Circuit, which reversed and held for the first time by any federal court that because the payments to the union funds were "readily identifiable and calculable", and were of substantial economic benefit to the employee, the payments were part of Hilyer's "average weekly wage" (App. 4a). In so ruling, the court purported to interpret "wages", which is defined as follows in Section 2(13) of the LHWCA, 33 U.S.C. § 902(13):

> (13) "Wages" means the money rate at which the service rendered is recompensed under the contract of hiring in force at the time of the injury, including the reasonable value of board, rent, housing, lodging or similar advantage received from the employer, and gratuities received in the course of employment from others than the employer.

STAGES AT WHICH THE FEDERAL QUESTIONS WERE RAISED AND PRESERVED

Both Morrison-Knudsen and its insurer, petitioner Argonaut Insurance Company ("Argonaut"), opposed the definition of "wages" adopted by the Court of Appeals before the Administrative Law Judge, the Benefits Review Board and the Court of Appeals, and all three bodies specifically ruled upon the issues raised in this Petition (App. 8a-14a, 31a-33a, 46a).

BASIS FOR FEDERAL JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 1254(1) to pass upon the Court of Appeals' interpretation of Section 2(13) of the LHWCA, as extended by the District of Columbia Workmen's Compensation Act.

ARGUMENT

At first blush, the decision below might appear to be an ordinary and narrow one of statutory construction in which the Court of Appeals simply adopted one of two equally permissible views of what the LHWCA means. In point of fact, however, the court has reached a result which, if not reversed, will have the most extraordinary and far-reaching consequences, literally putting some concerns out of business.

Moreover, the opinion below is wrong. It directly contradicts Congressional intent, as well as the consistent administrative interpretation of the Act by the Department of Labor ever since the Act's passage, it defeats this Court's admonition that industrial injuries must result in "prompt and certain recovery". If left unchanged, it will result in a tide of new cases in the federal courts as employers and employees (or their representatives) litigate over what contingent interests should or should not be part of "wages" and what value to place on each, and it ignores the basic purpose of the Act, which is to compensate survivors for what they have lost by reason of the employee's death.

A. Impact of the Decision Below

One trade journal has estimated that the cost of workers compensation claims could increase in the District of Columbia by as much as 50% as a result of the ruling below.[3] However, the ruling will have an impact far beyond the confines of the District—and already has begun to do so. Survivors of deceased employees in other jurisdictions have begun to seek benefits similar to those accorded Hilyer's widow by the court below, and the result is that insurers, self-insurers, employers and the Department of Labor are all in a quandary as to how to proceed.

For example, must insurers now set new rates and premiums, while at the same time increasing their re-

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[3] "Business Insurance", February 8, 1982, p. 1.

serves? And, if so, how do they go about estimating the costs of the various benefits which hereafter may be included as wages? The decision below makes it virtually impossible for insurers to price their products. At the very least, there will be numerous and lengthy rate filings before insurance commissioners. Even if the decision below is only applied prospectively, costs will soar, and an ever restrictive insurance market will become even more restrictive.

There is also the specter that the decision may be applied retroactively. In that case, insurers will be forced to pay benefits for which no premiums have been collected. This will force insurers to pay losses out of reserves and could affect their ability to provide workers compensation insurance at all. One can hardly imagine the chaos that would result from reopening many thousands of old claims where contingent interests had never been claimed or their value calculated.

As to self-insurers, how can they possibly contend with this new development, with workers compensation costs already at staggering proportions? For example, LHWCA costs in the New York harbor are already 86% of payroll. It is no exaggeration to state that the decision below could boost workers compensation premiums *above* payroll. Not only do such self-insurers have most of the insurer problems noted above, but they also would have to post additional surety in order to remain qualified under Department of Labor regulations. Many of them could not do this. Moreover, although the LHWCA was intended to be uniform, different classes of self-insureds' employees almost certainly would receive different and disparate treatment under the Act, since contingent interests will vary.

What records must be maintained by employers to be able to substantiate weekly wages? Record-keeping and computer time will become far more costly.

And, finally, must the Department of Labor, which has the statutory obligation to calculate the "national average weekly wage" under 33 U.S.C. §§ 902(19), 906(b)(1), and which has *never* included the type of benefits mandated by the Court of Appeals, now re-evaluate and recalculate its computation in disability cases? This would be a virtually impossible task even if the Act is applied only prospectively, but it would become a nightmare of unreality if the decision were applied retroactively.

Moreover, one could argue—as unions and claimants undoubtedly will—that if the decision below makes sense as to the LHWCA, it makes equally good sense as to other statutes such as the Federal Employees Compensation Act, and those acts governing temporary disability insurance, unemployment compensation, Social Security, and state workers' compensation programs, which include language essentially the same as LHWCA. If an employer's contributions to all of these programs were to be included in each employee's average wage, the increased costs would reach truly astronomical proportions. The decision below will have the anomalous result, not only of discriminating against employees who do not have funds paid by their employers but of causing *double* payments to be made on behalf of union employees—first to the union funds before the injury and then to the surviving spouses thereafter.

As noted in the trade journal referred to above (n.3, *supra*), "* * * more workers compensation cases will end up in the courts as employers and employees battle over the value of benefits, experts say." But it is not only the *value* of benefits that will be litigated. The already overburdened federal courts will also repeatedly be asked to decide *which* benefits in regard to *which* employees under *which* statutes should be accorded the status of the union trust fund payments dealt with in the opinion below. This is particularly true in view of the fact that attorneys' fees are awarded if workers compensation is in-

creased over and above what employers agree to pay, so that there will be an incentive for attorneys to seek to have as many contingent interests as possible included in awards.

We are addressing an Act with extraordinary coverage. At the time Congress was considering the 1972 amendments to the LHWCA, a Senate subcommittee estimated that approximately 800,000 employees were covered by the Act and its extensions (including the District of Columbia). Senate Subcommittee on Labor of the Committee on Labor and Public Welfare, Committee Print, 92nd Cong., 2nd Sess. (1972), forward page. The Department of Labor estimates that by last year this figure had risen to approximately 905,000. In its most recent budget submission to the Congress, the Department reported 251,000 persons injured under the Act during 1981, of which 61,000 actually lost time from their work because of those injuries. The Department projected similar figures for 1982 of 253,000 and 67,000, and for 1983 of 270,000 and 73,000. Thus, not only are the figures themselves imposing, but they are increasing annually. United States Department of Labor, 1983 Budget Justification of Appropriations Estimates for the Committee on Appropriations (January 1982), ESA-33, Table II of Longshoremen's and Harbor Workers Compensation Act Workload Statistics FY1981-FY1983.

B. The Decision Below Was Erroneous

Because of the extraordinary impact of the Court of Appeals decision upon so many thousands of employees, employers and insurers, as well as the Department of Labor, that decision would warrant plenary review by this Court even if the result reached were a correct one. The fact is, however, that the decision is demonstrably wrong—for a number of reasons.

1. ***The Court's Interpretation of the Act Flies in the Face of the Legislative History.***

LHWCA, passed in 1927, was almost a verbatim copy of an Act then in existence in New York. 1922 N.Y. Laws, ch. 615. Without exception, the addition of union trust fund payments to the concept of wages had *never* been asserted, attempted or accomplished under the New York statute. On the contrary, the New York statute was uniformly interpreted to equate wages with cash or its equivalent paid directly to the worker. That was the interpretation which Congress understood at the time it passed the LHWCA, and it was the one which has prevailed ever since—until the entirely new concept developed for the first time by a federal court in the opinion below.

It is highly significant that Congress has modified various aspects of the LHWCA since its passage in 1927—including a far-reaching overhaul in 1972—but has never seen fit to change the original definition of "wages" in 33 U.S.C. § 902(13). The importance of this is pointed up in *Potomac Electric Power Co.* v. *Director, OWCP*, 449 U.S. 268 (1980) (*"Pepco"*). The issue there was whether a permanently partially disabled employee could elect to receive the larger of two recoveries set forth in the LHWCA. The Court held that while Congress could certainly have authorized such an election, it had not done so. Despite the need to construe the Act so as to conform to its humanitarian objectives, and despite a recent trend in workers compensation law away from the idea of exclusivity of scheduled benefits, the "plain language" of the Act as construed at the time the LHWCA was adopted was held to prevail. *Id.* at 273, 276. In the instant case, there has not even been a "recent trend" toward to the Court of Appeals' interpretation, as there was in *Pepco*.[4]

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[4] LS/HW Program Memorandum No. 32 of the Bureau of Employees' Compensation, Wage and Labor Standards Administration, United States Department of Labor, issued on June 17, 1968,

This Court in *Pepco* laid particular stress upon the interpretation accorded the New York statute after which the LHWCA was patterned, at the time the LHWCA was adopted. There, as in the instant case, New York case law supported the "plain language" approach. In addition, this Court pointed out that the LHWCA was never intended to provide "complete compensation for the wage earner's economic loss." *Id.* at 281.[5] Rather, the purpose was to have "definite" limits, assuring a "prompt and certain recovery". *Id.* at 281, 282. In this case, nothing could assure less definite limits and a less prompt

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directly considered the issue of whether contributions to union funds such as those involved in the instant case should be included in computing the average weekly wage. Significantly, the Memorandum incorporated the text of an Associate Solicitor's Advisory opinion and concluded that "'* * * we feel bound by [the] past practice of excluding these fringe benefit contributions from wages * * *'", and that if any change was to be made, "'* * * it is up to Congress * * *'" (p. 3).

[5] One of the reasons why it was never intended for compensation payments to equal actual loss was to prevent malingering. See 1 Larson, *Workmen's Compensation Law* § 2.50, pp. 11-12 (1964).

An example of how this would occur results from the current collective bargaining agreement governing work by members of the International Longshoremen's Association in the Atlantic and Gulf Coast ports. This agreement, which is midway through its three-year term, currently provides for a $12.80 basic hourly wage, plus $4.59 per hour of work to be paid into pension, health and welfare funds. (Locally negotiated contingent interests and contingent interests required by law are extra.)

Assuming a 40-hour work week, the longshoreman's actual wages would be $512.00. In the case of total disability under the LHWCA, the compensation rate (at 66 2/3%) would be $341.32. However, if the contract fringe benefits were to be included in the computation, the base upon which the compensation rate would be applied rises to $695.60 and would yield a weekly compensation rate of $463.72, or nearly 90% of actual pre-injury wages, tax-free. This would yield a post-injury income of about $24,100 per year, or about $3,900 *more* than the pre-injury spendable income (gross wage minus Federal and State taxes and FICA) of $20,200. Thus, any economic incentive to return to work would be eliminated.

and certain recovery than the interpretation of "wages" advanced by the Court of Appeals.

2. *The Decision Below Violates the Plain Language of the Statute.*

Here, the relevant definition of "wages" is clear. The key words are "money rate". The special payments listed by the statute—board, rent, housing, lodging and gratuities—have two key features in common. They are paid directly and unconditionally to the employee, and they have a clear and present cash value. The same is true of other payments that have been recognized as coming within the phrase, "similar advantage"—namely, transportation, overtime and vacation pay. By contrast, payments into a union fund are not paid to the worker, and at no time can he or she demand their value in cash.

It is important to recognize that when Congress wishes to include union fund contributions in the concept of "wages", it is fully cognizant of how to accomplish the task. Thus, in the Davis-Bacon Act, as amended, 40 U.S.C. § 276a (1976), the definition of "wages" expressly includes all contributions by employers into union trust funds (App. 54a). No such language appears in the "wages" definition in LHWCA. This could hardly have been an oversight. "Board" and "rent", for example, are dwarfed in significance by union-fund payments that could double wage figures, and yet "board" and "rent" were specifically spelled out in the LHWCA definition of "wages" (App. 50a).

There is a clear dichotomy between, on the one hand, what is paid directly to a worker, is tangible, and is convertible to cash, and, on the other hand, those contingent interests which do not fit any of these categories. A contingency in a union fund resulting from payments directly to that fund is of the latter type.

Here, the record showed that Hilyer had no right to tell his union how to use the funds (App. I-60).[6] As a

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[6] The citation here is to the record before the Court of Appeals.

matter of fact, there is no evidence that before his death he even had a vested interest in the funds or that he had ever received any pension, insurance, disability or health payments, or any training, under any of the three funds.

3. *The Decision Below Completely Disregards the Specific Purpose of the Concept of "Wage" in a Compensation Statute.*

The central fallacy in the opinion below is that it attempts to interpret "wages" in the abstract. It declares the sole issue to be whether the contingent interest is a "value" that is "readily identifiable and calculable." It then works those words over as if it were writing a dictionary instead of a working rule in a total system designed for a definite practical purpose. What the court should have done was to realize that the purpose of calculating the worker's wage before his death is to determine *what his or her spouse has in fact lost by reason of the death*, in terms of what the family was accustomed to rely on to maintain its standard of living. Unlike most other social insurance systems, that pay flat-rate benefits, the American system has always attempted to key the benefit to past wages. The reason is not some notion that there is a legal right to a precise mathematical counterpart to some pre-injury "values", whether identifiable and calculable or not.[7] The reason is that at the time of injury or death, the family was living at a certain level represented by average wage, and the cash income benefit should be keyed to that wage on which the family actually lived.

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[7] Even when the exact value of so-called "fringe benefits" which have actually been paid to the worker have been established on the record, these monies have been held not to be earnings within the meaning of Section 10 of the LHCWA. For example, in *Strand* v. *Hansen Seaway Service, Ltd.*, 614 F.2d 572 (1980), the Seventh Circuit Court of Appeals held that longshoremen's off-season state unemployment benefits were not part of their annual earnings for the purpose of determining their disability benefits.

Obviously, some tangible non-wage payments must also be included, such as board and room, and this statute expressly includes them, since these are indeed part of the standard of living and are indeed lost by the death or injury. But as to contingent interests, the fallacy is that they are not a value that, first, form part of the standard of living, and, second and more importantly, are not in any meaningful sense lost as the result of the death or injury.

To sharpen this point, postulate that the contingent interest in question is group life insurance—a very common type of fringe benefit. The worker is killed. In terms specifically of that contingent interest, what has the surviving spouse lost? Nothing. To the contrary, he or she has gained the face value of the life insurance. The same analysis can be repeated for almost all contingent interests. Cessation of payments into union pension funds means nothing, because the deceased will never qualify for a pension. Cessation of payments for training is equally meaningless. If these contingent interests are "wage", then why not the employer's contribution to Social Security?—a move that would dramatically increase the wage basis. The answer, again, is that by the deceased's death the surviving spouse, far from losing a "value", gains the survivor's benefits of the system. Why not Unemployment Insurance premiums? Again, nothing is lost. To reduce the whole matter to absurdity, one need only adduce another common contingent interest—supplementary workers' compensation. The death or injury of the worker here actually confers the benefit that the premium payments only anticipated. If one adds to the face value of the supplemental compensation the value also of the insurance premiums used to purchase that supplemental compensation, one ends with the most preposterous kind of double payment.

4. ***The Decision Below Conflicts with A Consistent Administrative Interpretation.***

For 70 years—even before the LHWCA became law—the Department of Labor has been interpreting wages in workers compensation statutes, and without exception it has done so in a way that excluded payments to union funds. In particular, the Department must calculate the national average weekly wage, and, in doing so, it has never in its history included the types of contingent interests included as wages by the court below.[8] Surely, great weight should be given to this uninterrupted statutory construction by the Department with the most expertise in dealing with the Act. *United States* v. *Rutherford*, 442 U.S. 544, 553-554 (1979); *Bayside Enterprises, Inc.* v. *NLRB*, 429 U.S. 298, 302-304 (1977); *Trafficante* v. *Metropolitan Life Ins. Co.*, 409 U.S. 205, 210 (1972).

"Such deference is particularly appropriate where, as here, an agency's interpretation involves issues of considerable public controversy, and Congress has not acted to correct any misperception of its statutory objectives." *United States* v. *Rutherford, supra*, 442 U.S. at 554. If Congress had thought, during the several instances when it addressed itself to necessary changes in the LHWCA, that both the Department of Labor and the

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[8] One of the reasons the Department has not done so—in addition to the fact that assessing their value would be virtually impossible—is that the Department's calculations are based on wages taxable to the worker. See *Monthly Labor Review*, United States Department of Labor, Bureau of Labor Statistics March 1982, p. 64. The contingent interests dealt with in the instant cases are not reported on the worker's W-2 statements, nor are they taxable to the worker until he or she actually receives a specific benefit, such as a pension from a trust fund. It would be anomalous, to say the least, if such contingent interests were included in the individual worker's average weekly wage under the LHWCA when determining disability benefit levels, but they were not included in the determination of the national average weekly wage which defines the limitation for benefits under the Act.

Benefits Review Board [9] had been leaving out of "wages," as well as benefits awarded to the spouses of deceased workers, as important an element as payments to union funds, Congress certainly would have amended the Act in order to correct the error. It has never done so. Instead, the Court of Appeals has amended the Act by judicial fiat—a power it does not have. *Pillsbury* v. *United Engineering Co.*, 342 U.S. 197, 200 (1951).

5. ***The Decision Below Is Incapable of Administration.***

We have shown above the adverse impact of the decision below upon insurers, self-insureds, employers, the Department of Labor, and the federal courts. But there is a further reason why the decision is simply incapable of administration. While it is true, as the Court of Appeals noted, that payments into the union funds are "calculable" [10] in the sense that the union contract spelled out the payments to be made based on each *hour* of work, it is not each hour of work that determines benefits under the Act. Benefits are based on "average annual earnings," 33 U.S.C. § 910(a) (b) (c) (App. 53a). We do not even know—and cannot know—how many hours Hilyer would have worked during a full year because he was employed by Morrison-Knudsen for only five months. While it is one thing to use a "comparable" employee for the purpose of calculating annualized wages under the Act, it is quite another to assume that the union funds

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[9] Prior decisions of the Benefits Review Board have repeatedly held, contrary to the lower court's opinion, that union benefits are not includable in the employee's average weekly wage. *Hilyer* v. *Morrison-Knudsen Construction Co.*, 6 B.R.B.S. 754, 758 (1977); *Lawson* v. *Atlantic & Gulf Grain Stevedores Co.*, 6 B.R.B.S. 770 (1977); *Collins* v. *Todd Shipyards Corp.*, 5 B.R.B.S. 334 (1977); *Freer* v. *Duncanson-Harrelson Co.*, 9 B.R.B.S. 888 (1979); *Waters & Levis* v. *Farmers Export Co.*, Nos. 79-329A and 79-330A, decided 6/12/81, appeal pending 5th Cir., Nos. 81-4258 and 81-4273.

[10] Of course, everything that is "calculable" is not a fringe benefit. See, *e.g.*, *Trinity Services, Inc.* v. *Marshall*, 593 F.2d 1250 (D.C. Cir. 1978). See also n.7, *supra*.

would have vested and that the two employees would have had the exact same payments made to those funds, based on their individual hours of work. Certainly those who must calculate payments in advance for purposes of, for example, setting insurance premiums and reserves, will find that task impossible.

CONCLUSION

To announce a totally new interpretation of a vital and yet common phrase in a workers' compensation statute after 70 years of administration of the Act is, to say the least, judicially presumptuous. But worse still is that what was before a relatively certain and prompt method of payment to claimants will now result in turmoil, uncertainty, delay and endless litigation, unless this Court reverses the result below. We respectfully urge the Court to do so.

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